

1. **REPORTABLE**

2. CASE NO: SA
24/2013
3.

4. **IN THE SUPREME COURT OF NAMIBIA**

5. In the matter between:

6.

7. **MUNICIPAL COUNCIL OF WINDHOEK**

8. **Appellant**

9. and

10. **TELECOM NAMIBIA LIMITED**

11. **Respondent**

12. **Coram:** SHIVUTE CJ, DAMASEB DCJ and MAINGA JA

13. **Heard:** **23 October 2014**

14. **Delivered:** **2 March 2015**

15. _____

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16. **APPEAL JUDGMENT**

17. _____

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18. SHIVUTE CJ (DAMASEB DCJ and MAINGA JA concurring):

Introduction

[1] This appeal concerns the question whether s 24 of the Posts and Telecommunications Act 19 of 1992 authorises the respondent to install public telephones and telephone booths on the appellant's land without its consent, and, if indeed it does, whether this contravenes Art 16 of the Namibian Constitution. Section 24 of the Posts and Telecommunications Act, 1992 (the Act) has since been repealed with effect from 18 May 2011 by s 134 of the Communications Act 8 of 2009. It is to be noted however, that s 60 of the Communications Act, 2009 embodies a provision similar to s 24.

[2] The appellant is the Municipal Council of Windhoek, a local authority established under the Local Authorities Act 23 of 1992. The respondent is a statutory body corporate wholly owned by the State and established by s 2(1)(b) of the Posts and Telecommunications Companies Establishment Act 17 of 1992.

[3] The powers and duties of the respondent are set out in the Posts and Telecommunications Companies Establishment Act, 1992. Its principal object is to conduct a telecommunications service throughout Namibia. Towards this end, the respondent is empowered to install and erect public pay telephones in purpose-built telephone

booths or cubicles (also referred to in the Act as 'cabinets'). Section 24 of the Act authorised the respondent to enter upon any land, including any street, road, footpath reserved for public purposes and to construct and maintain a telecommunications line or any work including a telephone booth. The word 'street' is defined in s 1 of the Local Authorities Act, 1992 as meaning 'any road, thoroughfare, pavement, sidewalk or lane or right of way set apart for the benefit of residents in a local authority area'.

[4] Over the years the respondent and the State, being the respondent's statutory predecessor, have been responsible for establishing more than one thousand telephone booths on the appellant's property reserved for public use. It is not contested that the erection of the majority of these phone booths was carried out with the appellant's consent.

Preliminary matters

[5] Two preliminary matters were considered by this court at the outset of the hearing. First, counsel for the appellant conceded that although the appellant had filed the record within the time period prescribed by the rules of this court, it was late in lodging its bond of security. This delay was subsequently explained by the appellant, and the application for condonation made in respect of the late filing was not opposed by the respondent. A case having been made out for the grant of condonation, the application was accordingly granted. Second, the respondent in its written submissions stated that the power of attorney filed by the appellant's legal practitioners pursuant to rule 5(4) (a) of the Rules of the Supreme Court (which authorises the institution of this appeal) was executed by a Ms Ingrid Cupido as the nominee of the appellant but did not state Ms Cupido's position. On this basis, the respondent submitted that no valid authority on behalf of the appellant existed for the purpose of authorising the appeal. This was remedied, however, by an affidavit deposed to by Ms Cupido on 22 October 2014 in which she stated that she was employed as Corporate Legal Advisor by the City of Windhoek. Consequently, the opposition to the filing of the power of attorney was not persisted with. Having dealt with these preliminary matters, I now move on to the factual background of the appeal.

Background

[6] As noted above, the respondent provides telecommunications services throughout Namibia. The Posts and Telecommunications Establishment Act, 1992 provides that the State is the sole shareholder of the respondent, and from 1994 the Government has entered into performance agreements with the respondent to ensure that it pursues its statutory purpose of providing the widest possible access to communication services throughout the country. In pursuit of this purpose, the respondent has installed pay telephones and booths throughout the country and, of relevance to this matter, in the city of Windhoek. The location of some of these pay phones and the booths themselves predate the establishment of the respondent, and were erected by its predecessor, although in some cases, the respondent has replaced pre-established telephones and booths with modern versions.

[7] According to the respondent, these telephones and booths are set up at various strategic locations in order to provide access to telecommunications services to members of the public who would not otherwise have access to such services (either in the form of their own residential home telephone or a mobile telephone), or are temporarily

unable to use their usual mobile or home telephone. Many of these pay phones are operated on an uneconomic basis, and according to the respondent have nonetheless been installed for the purpose of providing the greatest possible access to telecommunications services to the people of Namibia.

[8] The matter presently before the court originates from a dispute between the parties relating to five lease agreements signed between 1997 and 2000 to facilitate the installation of several telephone booths on the appellant's property. These leases relate to only a small number of the phone booths constructed by the respondent during this period. It is common cause that a substantial number of booths were also erected around this time without the agreement or notification of the appellant.

[9] Initially, the respondent complied with its obligations under the lease agreements, but then stopped the payments owed under the terms of those agreements. In several letters, the appellant notified the respondent that it intended cancelling the lease agreements in the event that the respondent did not resume the lease payments. In a letter of response dated 13 March 2013, the respondent said that it had been advised by its lawyers that s 24 'bestow[ed] upon Telecom

Namibia a statutory servitude' that gave the respondent the right of free use over public land, and prevented others from charging the respondent to obtain a right of use already granted to it by statute. The appellant countered in a letter dated 18 March 2003 that such an interpretation of s 24 would render the provision unconstitutional. On 8 September 2003, the respondent informed the appellant that it had no intention to make further payments in respect of the lease agreements. The appellant then initiated legal proceedings in the High Court.

[10] After the initiation of proceedings, the respondent was advised that it was in fact obliged to honour the terms of the existing lease agreements (although curiously the respondent denies that it was obliged to enter into the leases in the first place). The respondent accordingly tendered to pay all rental payments then in arrears in respect of the period up to three years prior to the institution of proceedings. It also tendered the appellant's costs of the application up to the date of the tender, in view of the fact that this could be considered substantial success. The respondent also stated that although not under any obligation to do so, it was prepared to provide the appellant with a list of all telephone booths in the Windhoek area. The appellant accepted that tender, although not in full and final settlement of the dispute between the parties.

[11] In its application to the High Court, the appellant (as applicant) sought the following relief:

1. A declaration that the respondent has no right to keep public phone booths on the applicant's property without complying with the lease agreements entered into between the parties;

2. A declaration that the respondent has no right to erect and keep public phone booths on the applicant's property without the applicant's agreement and without the payment of compensation to the applicant;

3. In the alternative to paras 1 and 2, a declaration that s 24 of the Act, insofar as it purports to confer the right on the

respondent to erect and keep phone booths on the applicant's property without its agreement and without payment, contravenes the Constitution;

4. An order that the respondent comply with the existing lease agreements entered into between the parties by paying the amounts stated in each of the relevant agreements;

5. An order that the respondent provide the applicant with a list indicating the location of each and every telephone booth erected upon the applicant's property and when it was erected;

6. An order that the respondent enter into agreements similar to the existing lease agreements for each and every telephone booth erected on the applicant's property within 30 days of the date of the order, failing which the applicant is authorised to remove the telephone booths; and

7. An order that the respondent pay the costs of the application.

[12] Before the commencement of the hearing of the application, the respondent conceded prayer 4 to a certain extent and tendered payment for the existing lease agreements. It also provided the list requested by prayer 5 (although it made no admission that it was obligated to do so).

[13] The learned judge *a quo* correctly identified the two issues on which the application turned and as already noted it is the same issues that should be decided on appeal: first, whether s 24 authorised the respondent to erect phone booths on the appellant's land without its consent; and second, in the event that the court found that s 24 did authorise the respondent to erect phone booths on the appellant's land without its consent, whether this contravened Art 16 of the Namibian Constitution. The court below granted prayers 1, 4 and 5 and dismissed prayers 2 and 3 with costs.

[14] The appellant appeals against the dismissal of prayers 2 and 3 and the respondent cross-appeals against the order granting prayers 1 and 5 of the notice of motion. The appellant also submits that although the learned judge *a quo* did not express any views on prayer 6, it can be assumed that he meant to dismiss prayer 6, and so this prayer should also be considered and decided by this court.

The appellant's submissions

[15] The appellant submits that the High Court erred in four respects. First, it is submitted that the judge incorrectly applied the principle that a court may only read words into a statute by implication if effect cannot be given to the statute as it stands without such action; second, that the judge *a quo* mistakenly found that it was not necessary for the respondent to obtain the appellant's agreement to erect public telephone booths on the appellant's land; third, that the learned judge incorrectly found that s 24 did not infringe the appellant's Art 16 rights (and also failed to address the question of whether s 24 is consistent with Art 22 of the Constitution); and fourth, that the judge *a quo* failed to address the appellant's contention that the respondent's interpretation of s 24 would mean that the respondent is the only public utility that has the right to enter on to the property of others without the consent of the owner thereby breaching Art 10(1) and Art 5 of the Constitution, which afford equal protection before the law.

[16] On the question whether s 24 authorised the respondent to erect phone booths on the appellant's land without consent, counsel for the appellant argues that it is clear that the legislator intended, without explicitly saying so, that the respondent would provide

telecommunications services by agreement with whoever wants the service. Where it is the public that wants the service, the relevant agreement must be made with the person or entity that owns the property on which the service is to be erected. Counsel contends that although the need for agreement is not explicitly spelled out in s 24, this intention is made plain by the overall context of the Act. In particular, counsel drew the court's attention to ss 26 and 27 of the Act (both now also repealed), which he argued contemplated the agreement of – and notice to – a local authority in respect of the provision of a telecommunications service. Section 26 provided that:

'(1) Where the telecommunications company and a local authority have come to an agreement that in a particular area electricity supply and telecommunications services shall be provided by means of underground cable, such local authority may, when installing a cable for the underground electricity supply line . . . provide a conduit pipe or other facilities for the installation of an underground telecommunications service line

(2) The costs of the provision of such conduit-pipe or other facility shall be payable to the local authority in question and shall for the purposes of any law be deemed to be fees payable by the owner of

the premises in question to the local authority in respect of the installation of the electricity supply line’.

[17] Section 27 insofar as it is relevant to the appellant’s argument provided as follows:

‘(1) The Telecommunications company may after reasonable notice in writing to any local authority or a person owning or having control and care of any street, road or footpath, construct and maintain in the manner specified in the notice any telecommunications lines, pipes tunnel or tube required for telecommunications purposes under any such street, road or footpath’

[18] Counsel also argued that if s 24 did authorise the respondent to erect phone booths on the appellant’s land without its consent, it would be in contravention of Art 16 of the Constitution.

[19] The respondent accepts that the application of s 24 constitutes a limitation of the appellant's property rights, but argues that such limitations are in certain cases permissible, especially where they are in the public interest. By contrast, counsel for the appellant submits that limitations of this nature are required to comply with Art 22 of the Constitution, which provides that any limitation of constitutional rights shall be of general application, and must specify the extent of the relevant limitation and identify the constitutional provisions on which the authority to make such limitations is based.

[20] In effect, so argues counsel for the appellant, the actions of the respondent pursuant to s 24 amount to expropriation as foreshadowed by Art 16(2). This is relevant because where the State or a competent body is authorised by law to expropriate property in the public interest, such action is subject to the payment of just compensation.

[21] Furthermore, counsel argues that the respondent having the powers set out in s 24 would potentially violate Art 10(1) read with Art 5 of the Constitution on the basis of unequal treatment before the law. This is because such an interpretation of the section would give the respondent certain powers and the right to infringe property rights.

According to the appellant, few other public utility entities (including the appellant) in Namibia enjoy such privileges.

[22] Counsel also submits that the respondent's interpretation of s 24 gives rise to additional problems, including a conflict with the Local Authorities Act, 1992. Section 48(1)(b) of the Local Authorities Act, 1992 empowers the appellant to let or grant the right to use a public space with the approval of the Minister. According to the appellant, this illustrates that the public land administered by it may only be dealt with subject to the approval of the Minister. It is not clear that the respondent should be able to override this requirement due to the operation of s 24. In addition, it is submitted that if s 24 were interpreted as the respondent contends, this would contravene s 51(b) of the Local Authorities Act, 1992, which stipulates offences and penalties for unauthorised construction in streets and public places.

[23] For these reasons, counsel for the appellant argues that if faced with two possible interpretations of a legislative provision, the court should favour the one that least infringes the rights of others and the Constitution. Furthermore, so emphasises counsel, the court must promote rather than undermine the rights protected in the Constitution. In light of this, s 24 should be 'read down' to incorporate the

requirement for agreement so that Art 16 is not violated. Counsel relies for this proposition on the decision of the South African Constitutional Court in *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) para 20.

The respondent's submissions

[24] Counsel for the respondent argues firstly that s 24, properly construed, does indeed allow the respondent to erect phone booths on the appellant's land without its consent. On a straightforward reading, s 24 requires no 'agreement', nor requires the respondent to pay compensation to the relevant local authority. Counsel highlighted that the respondent is statutorily required to promote 'an economically prosperous and efficient telecommunications system conducted on sound business principles'.

[25] Counsel for the respondent furthermore contends that the nature of the land referred to in s 24 and of its ownership is important: the public telephones on the appellant's property are on land reserved for public purposes as defined in the Local Authorities Act, 1992. Despite being owned by the Council of Windhoek, the land in issue should not be treated as if it was privately owned - it is land specifically dedicated to the use of the public. Streets and public places are only

'owned' and administered by the appellant in the sense that the purpose of the property is a public one. In the submission of counsel, s 24 therefore allows the respondent to pursue a specific and essential function designated to it by the Legislature, which regards the construction of telephones in public areas to constitute an essential and a vital service to the public.

[26] Second, so counsel contends, the erection of telephone booths (and other limitations of property rights as contemplated by s 24) constitutes a permissible limitation of the appellant's property rights, and neither does it amount to expropriation nor does such an interpretation of the section contravene Art 16 of the Constitution.

[27] In counsel's submission, the appellant has not made it clear exactly how any of its existing rights have been compromised. Counsel argues furthermore that the issue of expropriation does not arise for several reasons: first, the ownership of the land does not change; second, no rights belonging to the appellant are taken away, i.e. the appellant never had the right to conduct telecommunication services on the land and such right could therefore not be expropriated from it; third, the land is public land, remains public land, and one more use for the public is included and added to the existing use; fourth, s 24

relates solely to the regulation of the use of the land and does not affect the appellant's ownership; and lastly counsel argues that apart from not placing a constraint on the exercise of the appellant's ownership, the use of the land pursuant to s 24 is in the public interest, reasonable, and for a legitimate objective. The establishment of public telephones is in the public interest, which is consistent with the nature of the ownership of the land involved. The powers granted in terms of s 24 thus do not interfere with the nature of the land. They simply add a further public purpose for which the land may be used. According to counsel for the respondent, the appellant has overlooked the nature of its ownership, which is for a public purpose and the enjoyment of the public in its local authority area.

Does s 24 allow the respondent to install public telephones and booths without the consent of the appellant?

[28] One of the key issues in this appeal concerns how s 24 of the Act should be interpreted. Section 24 reads as follows:

'24 Right of entry and to construct lines across any land

The telecommunications company may for the purposes of this Act and conducting of its telecommunications service enter upon any land, including any street, road, footpath or land reserved for public purposes, and any railway, construct and maintain a telecommunications line or any work (including any pay phone cabinet) upon, under, over, along or across any land, street, road, footpath or waterway or any railway, and alter or remove the same, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.'

[29] The purpose of s 24 is clearly to facilitate the respondent being able to construct and maintain infrastructure essential for the maintenance of a country-wide telecommunications networks. Like the provision of other public services such as electricity and water, the provision of telecommunications is absolutely essential for individuals and businesses as well as the State as a whole. In that sense, the services that the respondent provides are public in nature and aim at providing direct benefits to all inhabitants of Namibia. In addition, the

provision of public pay phones is an exceptionally important service as it allows those individuals who are unable to afford a home phone or mobile phone to access means of communication. The importance of the services provided by the respondent was noted by this court in *M-Web Namibia (Pty) Ltd v Telecom Namibia Limited and Others* 2011 (2) NR 670 (SC). In that case, Chomba AJA writing for the court, remarked that:

'[T]he function assigned to [Telecom] was to be carried out countrywide, by virtue of its being the successor to the Post Office. Namibia is by no means a small country geographically and therefore that assignment was an enormous and costly responsibility . . . Telecom had to perform the telecommunication services countrywide per force of law, not by preference, and irrespective of profitability prospects.'

[30] The nature and importance of the responsibility referred to by Chomba AJA reflects the Legislature's very understandable concern that it must ensure that the respondent has the authority to carry out

necessary activities in the pursuit of its overall statutory mandate to provide a telecommunications system throughout Namibia. The Legislature did not qualify the authority provided in s 24 by making the consent or agreement of the relevant local authority necessary. As rightly noted by the judge *a quo*, the courts have adopted the approach that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands: *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A) at 22E-H. Section 24 is sufficiently clear in its terms and purpose that it is not necessary to assume that the respondent is only able to act with the consent of the appellant. Such a result could lead to very difficult situations where, for instance, urgent repairs to telecommunications infrastructure established on public land were required but the respondent was unable to obtain the consent of the appellant.

[31] Furthermore, I do not agree with the submission that the above interpretation of s 24 necessarily conflicts with certain provisions of the Local Authorities Act, 1992. Those provisions in the Act and the Local Authorities Act relied upon by the appellant either as examples of the requirement of an agreement or stipulations rendering the section to be in conflict with the Local Authorities Act cater for considerations

different from those addressed in s 24. Had the Legislature intended to have an agreement entered into between the respondent and the owner of the land reserved for public use before the respondent could enter upon such land and construct a telecommunications service thereon, it should have expressly said so. For the reasons stated earlier such a requirement cannot be read into the section.

[32] It is also significant that s 24 empowers the respondent only to perform certain acts on 'land reserved for public purposes', which in terms of the provision includes 'any street, road, or footpath'. The section does not give the respondent the authority to access privately owned land. This is so, because as already observed the purpose of entering public land was to facilitate the provision of a public service. I agree with the respondent that although the land is formally owned by and registered in the name of the appellant, it is by definition set apart for the benefit of residents and thus statutorily reserved for public purposes. Whilst certain rights accrue in respect of that property to the appellant, it is relevant that the purpose of the local authority is – like the respondent - to provide services to the public.

[33] Nevertheless, despite the fact that the respondent is not obliged to obtain the agreement of the appellant pursuant to s 24, I am

of the view that it is implied in s 24 that in its endeavour to access land reserved for public use for the purpose set out in the section, the respondent is required to act reasonably. It cannot, for instance, construct a row of ten telephone booths down the centre of Independence Avenue in Windhoek. As a statutory body, the respondent is subject to the requirements of administrative law and like other public decision-makers must ensure that its decisions are reasonable. If a local authority considers that any of the respondent's actions in accessing land reserved for public use in its area of jurisdiction for the purposes set out in the Act are manifestly unreasonable or otherwise contravene administrative legal standards, it is open to such a local authority, if so advised, to pursue legal action on that basis. This is, however, not the basis upon which the appellant approached the High Court in this matter.

Does s 24 contravene the Constitution?

[34] As has been pointed out by the South African Constitutional Court in *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at 894I, legislation will only be struck down as unconstitutional if such a course is absolutely necessary and required 'by the precise facts to which it is applied'. It will be recalled that the appellant relies, amongst others, on Art 16 of the Namibian Constitution for the contention that the

interpretation of s 24 proffered above renders the provision to be in conflict with that Article. The Article provides that:

Article 16 - Property

(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

[35] It is trite that the right to property is not absolute. Moreover, regulation of the use of property does not generally amount to expropriation, as has been explained by Strydom ACJ in *Namibia Grape Growers and Exporters Association and Others v The Ministry*

of Mines and Energy and Others 2004 NR 194 (SC) at 210J–211G as follows:

‘The owner of property has the right to possess, protect, use and to enjoy his property. This is inherent in the right to own property. It is, however, in the enjoyment and use of property that an owner may come into conflict with the rights and interests of others, and it is in this sphere that regulation in regard to property is mostly needed and in many instances absolutely necessary. Such regulation may prohibit the use of the property in some specific way or limit one or other individual right without thereby confiscating the property and without thereby obliging the State to pay compensation. There are many such examples, where, to a greater or lesser degree, the use or enjoyment of property, be it movable or immovable, is regulated by legislation and which would, on the argument of Mr Barnard, constitute a limitation on the right of ownership which will then render such legislation unconstitutional and can be challenged by anyone against whom such legislation is enforced . . .

It is in my opinion inconceivable that the founding fathers of our Constitution were unaware of the vast body of legislation regulating the use and exercise of rights applicable to ownership or that it was their intention to do away with such regulation. Without the right to such control it seems to me that it would be impossible for the Legislature to fulfil its function to make laws for the peace, order and good government of the country, in the best interest of the people of Namibia (Art 63(1) of the Constitution). It therefore seems to me that,

like the right to equality before the law (Art 10(1) of the Constitution), the right to ownership in property is not absolute, but subject to certain constraints which, in order to be constitutional, must comply with certain requirements’.

[36] On the facts of this appeal, it should be pointed out that what is contemplated under s 24 is not such an encroachment on the appellant’s right to property that it amounts to expropriation. Expropriation is the compulsory acquisition of property or a right in property. Generally, expropriation refers to the action of the State or a public authority in compulsorily acquiring land from a private owner in the public interest. In this case, the appellant has not demonstrated that the actions of the respondent pursuant to s 24 dispossess the appellant of its land or extinguish any right held by the appellant attaching to the relevant property. They simply limit the use and enjoyment of such right, but such limitation is justified on the basis that the land upon which the telephone booths were erected is reserved for public use, the very same category of people the telephone booths

were meant to serve. Such a construction is entirely consistent with the statutory function of the respondent to provide telecommunications services to the public.

[37] On the basis of the above legal principles and considerations, I conclude that s 24 does not contravene Art 16. In my view, any limitation of property rights brought about by s 24 in respect of land reserved for public purposes would be in the public interest and would not be in conflict with Art 22 of the Namibian Constitution. Nor do I consider the powers authorised by s 24 to be so expansive that they lead to breaches of Articles 5 and 10(1), which provide for protection of fundamental rights and freedoms as well as for equal treatment before the law respectively. In the light of the conclusion arrived herein, it would be otiose to address prayer 6 of the notice of motion, more so because no appeal has been lodged against the order granting this prayer. In my respectful view the appeal ought to be dismissed.

Issues in the cross-appeal

[38] One of the issues raised in the cross-appeal concerns the prescription period that should be of application on the facts of this

case. Counsel for the respondent argues that the court *a quo* mistakenly found that the respondent had conceded prayer 4 and thus granted that prayer. The respondent did concede that it was liable to pay to the appellant all amounts *due 3 years prior to the service of the application* (all the amounts which, in the view of the respondent, had not prescribed) and tendered to pay these amounts, but contended that it was not prepared to make payments arising more than 3 years before this. Prayer 4 on the other hand sought to have the respondent ordered to pay 'the amounts stated in *each* of the relevant agreements'.

[39] The respondent submits that if the court finds that the tender was accepted, the question of which prescription period is applicable does not arise. I note that although the deponent to the appellant's affidavit indicated that he was authorised to accept the tender, he did at the same time insist on the payment of the full amount owed in respect of each of the lease agreements and had duly noted that the tender was not in full and final settlement of this aspect of the dispute. Thus, the tender was not accepted in the terms it was made and it has become necessary to deal with the respondent's second leg of the argument.

[40] The respondent argues furthermore that if it is found that the tender was not accepted, the respondent is in any event not liable to pay any more than that which it tendered (i.e. payments due only from up to 3 years before the service of the application). According to the respondent, this is because the appellant does not form part of the 'the State' for the purpose of s 11(b) of the Prescription Act 68 of 1969, as is argued by the appellant.

[41] Ordinarily, a period of three years applies to prescription periods, but the appellant argues that s 11(b) of the Prescription Act, 1969 finds application. The subsection provides for a period of:

' . . . fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a)'.

[42] The appellant relies on the decision of the South African Supreme Court of Appeal in *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 (1) SA 866 (SCA), which found that a local authority is part of the State for the purposes of the Eskom Act, 1987. Counsel for the respondent disagrees that the appellant forms part of the 'the State' for the purpose of s 11(b) of the Prescription Act. In particular, counsel for the respondent relies on *Holeni v Land and Agricultural Development Bank of South Africa* (266/08) [2009] ZASCA 9 for that proposition. In that case, Navsa JA writing for the court found that 'the State' did not encompass the Land and Agricultural Development Bank of South Africa, and therefore that a three-year period (rather than a 15-year period) of prescription was of application.

[43] It is well-established in law that the meaning of 'the State' in legislation has no fixed meaning. The interpretation of the term depends on the specific piece of legislation being considered. In *Holeni v Land and Agricultural Development Bank of South Africa*, Navsa JA at para 11 observes that:

'Its precise meaning always depends on the context within which it is used. Courts have consistently refused to accord it any inherent characteristics and have relied, in any particular case, on practical considerations to determine its scope. In a plethora of legislation no consistency in meaning has been maintained.'

[44] His Lordship also cautions that in considering a statutory provision that provides for a 15-year prescription period, the meaning of 'the State' should be restricted. This was particularly relevant in *Holeni v Land and Agricultural Development Bank of South Africa*, which concerned the question whether a bank could be said to be part of 'the State' for the purposes of the legislation. In the present appeal, the facts are quite different. The entity in question here is a local authority, which embodies many public and State-like characteristics. Local authorities are established under Chapter 12 of the Namibian Constitution. The procedures for electing mayors and members of local authorities are extensively set out in the Local Authorities Act, 1992. The Minister responsible for Regional and Local Government and Housing exercises oversight of local authorities. Local authorities are largely financed through taxes and rates, exist for the purposes of providing public goods to the communities that they govern, and

provide a framework for community participation in the political process. For these reasons, I consider that a local authority may be said to constitute 'the State' for the purposes of s 11(b) of the Prescription Act.

[45] One other issue raised by the respondent in the cross-appeal is in connection with the order granted in terms of prayer 5. The respondent did provide a list of phone booths to the appellant (although the list did not specify when each telephone booth was erected, as demanded in prayer 5), but never conceded that it was under any obligation to do so. The appellant subsequently acknowledged the provision of the list and took the matter no further. A perusal of the heads of argument that were part of the record shows that the appellant did not persist with prayer 5 in its heads of argument in the High Court. Furthermore, counsel for the appellant told that court in oral arguments that the appellant was no longer seeking an order in terms of that prayer. I agree with counsel for the respondent that on this basis, the court *a quo* should not have granted prayer 5. The cross-appeal ought therefore to succeed on this score.

Order

[46] The following orders are made:

1. The appeal is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel;
2. The cross-appeal against the order granting prayer 1 in the court *a quo* is dismissed with costs, such costs to include the costs of one instructing counsel and one instructed counsel.
3. The cross-appeal against the order granting prayer 5 of the notice of motion is allowed with costs, such costs to include the costs of one instructing counsel and one instructed counsel.

- 4 The order of the court *a quo* in relation to prayer 5 is set aside and substituted for the following order:

'No order in respect of prayer 5 is made'.

SHIVUTE CJ

DAMASEB DCJ

MAINGA JA

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27. APPEARANCES

28. APPELLANT:

G Coleman

29.

Instructed by Kirsten & Co Inc

30. RESPONDENT:

T J Frank SC (with him R L Maasdorp)

31. Instructed by LorentzAngula Inc